78-1598

Supreme Court, U. S.
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APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW JERSEY SUPREME COURT

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1978
No.

EDWARD F. CLARK, JR., County Executive, and
THE BOARD OF CHOSEN FREEHOLDERS,

Petitioners,

vs.

HON. THOMAS S. O'BRIEN, Assignment Judge of
the Superior Court and JOHN J. DEGNAN,
Attorney General of New Jersey on Behlaf of
Respondent,

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APPENDIX

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article II

Section 1. (1) The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Article III

Section 1. The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

ARTICLE III

DISTRIBUTION OF THE POWERS OF GOVERNMENT

1. Branches of government

1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

N.J.S.A. 40:41A-1

MUNICIPALITIES AND COUNTIES

Article 1. Procedures for Adoption for Optional County Charter Plans

40:41A-1. Submission of charter study question

Whenever authorized by resolution of the board of freeholders or on petition of the registered voters of any county, an election shall be held in the county upon the question, "Shall a charter study commission be ~~elected~~ created to study the present governmental structure of . . . county, to consider and make findings concerning the form of county government and to make recommendations thereon?" A petition calling for such an election shall bear the signatures of a number of persons registered to vote in the county equal to or exceeding in

number ~~10%~~ 10% of the persons registered to vote in the county on the fortieeh day preceding the most recent previous primary or general election. Whenever such resolution or petition shall be filed with him, the county clerk shall provide for submission of the question at the next general election occurring not less than 60 days after the date of such filing. At the election, the question shall be submitted in the same manner as other public questions.

When a resolution or petition for the ~~election~~ creation of a charter study commission has been duly filed with the county clerk, no other such resolution or petition and no other proceedings for the adoption of any other charter or form of government available to the county may be filed unless the voters shall decide the aforesaid question in the negative or until the charter study commission ~~elected~~ created by the voters shall have been discharged.

40:41A-30. General powers

The grant of powers under this act is intended to be as broad as is consistent with the Constitution of New Jersey and with general law relating to local government. The grant of powers shall be construed as liberally as possible in regard to the county's right to reorganize its own form of

government, to reorganize its structure and to alter or abolish its agencies, subject to the general mandate of performing services, whether they be performed by the agency previously established or by a new agency or another department of county government.

Based on the need to develop effective services to meet problems which cross municipal boundaries and which cannot be met effectively on an individual basis by the municipalities, the State, or other units of government, this act shall be construed as intending to give the county power to establish innovative programs and to perform such regional services as any unit that has the legal right to perform such service for itself may determine, in its own best interest, to have the county perform on a contractual basis.

ARTICLE 3. COUNTY EXECUTIVE PLAN

A. FORM OF GOVERNMENT

40:41A-31. Form; designation

The form of government provided in this article shall be known as the "county executive plan," and shall, together with articles 2 and 7 of this act,[1] govern any county whose voters have adopted it pursuant to this act.

40:41A-32 MUNICIPALITIES AND COUNTIES

40:41A-32 Elected officers

Each county operating under this article shall be governed by an elected board of freeholders and an elected county executive and by such other officers and employees as may be duly appointed pursuant to this act, general law, or ordinance.

L.1972, c.154, Sec.32, eff. Sept. 19, 1972.

B. COUNTY EXECUTIVE

40:41A-33. Qualifications, election, term

The county executive shall be a qualified voter of the county residing in the county. He shall be elected from the county at large for a term of 4 years commencing on January 1 next following his election.

L.1972, c.154, Sec.33, eff. Sept. 19, 1972.

40:41A-34. Salary

The salary of the county executive shall be fixed by ordinance of the board of freeholders; such salary shall be reasonable and commensurate with the duties of the office and with the fact that the position of county executive is and shall be a full-time position. The salary of the county executive may not be lowered during his tenure in office.

L.1972, c.154, Sec.34, eff. Sept. 19, 1972.

40:41A-35. Vacancies

The office of county executive shall be deemed vacant if the incumbent moves his residence from the county or he is by death, physical or mental illness or other casualty unable to continue to serve as county executive. Any vacancy in the office of county executive shall be filled in the manner prescribed by law for the election of county officers at the next general election occurring not less than 60 days after the occurrence of the vacancy. The board of freeholders may appoint one of their number or the chief administrator to serve as acting county executive until a successor has been elected. During the temporary absence or temporary disability of the county executive the chief administrator shall serve as acting county executive.

L.1972, c.154, Sec. 35, eff. Sept. 19, 1972.

40:41A-36. Duties.

The executive power of the county shall be exercised by the county executive. He shall:

a. Report annually to the board of freeholders and to the people on the state of the county, and the work of the previous year; he shall also recommend to the board whatever action or programs he deems necessary for the improvement of the county and the welfare of its residents. He may from time

at his discretion recommend any course of action or programs he deems necessary or desirable for the county to undertake;

b. Prepare and submit to the board for its consideration and adoption an annual operating budget, and a capital budget ~~and a capital program~~, establish the schedules and procedures to be followed by all county departments, offices and agencies in connection therewith, and supervise and administer all phases of the budgetary process ~~as set forth in sections 132 to 141 of this act~~;

c. Enforce the county charter, the county's laws and all general laws applicable thereto;

d. Supervise the care and custody of all county property, institutions and agencies;

e. Supervise the collection of revenues, ~~and he shall~~ audit and control all disbursements and expenditures and ~~shall~~ prepare a complete account of all expenditures. ~~He shall also designate the repositories of county funds~~;

f. Sign all contracts, bonds or other instruments requiring the consent of the county;

g. Review, analyze and forecast trends of county services and finances and programs of all boards, commissions, agencies and other county bodies, and report and recommend thereon to the board;

h. Develop, install and maintain centralized budgeting, personnel and purchasing procedures as may be authorized by the administrative code;

i. Negotiate contracts for the county subject to board approval; make recommendations concerning the nature and location of county improvements and execute improvements determined by the board;

j. Assure that all terms and conditions, imposed in favor of the county or its inhabitants in any statute, franchise or other contract, are faithfully kept and performed;

k. Serve as an ex-officio nonvoting member of all appointive bodies in county government.
L.1972,c.154,Sec.36, eff. Sept. 19, 1972. Amended by L.1975, c.84, Sec. 11, eff. May 5, 1975.

40:41A-37. Powers

The county executive:

a. Shall supervise, direct and control all county administrative departments;

b. With the advice and consent of the board, shall appoint the administrator, the heads of departments and, if so provided in the administrative code, of any designated divisions within such departments, and the members of all county boards, ~~and~~ commissions and authorities;

c. May, at his discretion, remove or suspend any official in the unclassified service of the

county over whose office the county executive has power of appointment in accordance with the provisions of section 87b;[1]

d. May, at his discretion, but subject to any pertinent provisions of the administrative code or civil service requirements, delegate to department heads powers of appointment and removal, ~~subject to civil service provisions~~, of their departmental employees. If the county executive does not so delegate his power he may appoint and remove, subject to civil service requirements, all employees whose positions have been ~~authorized by resolution of the board~~ created in accordance with the administrative code, ~~by civil service, or as provided in the adopted county budget~~, and the manner of whose appointment is not specified elsewhere in this article;

e. May require reports and examine the accounts, records and operations of any agency of county government;

f. May at his discretion order any agency under his jurisdiction as specified in the administrative code to undertake any task for any other agency on a temporary basis if he deems it necessary for the proper and efficient administration of the county government to do so;

g. Shall approve each ordinance of the board by

signing it, or may veto any ordinance by returning it to the clerk of the board within 10 days of passage with a written statement of his objections to the ordinance. If two-thirds of the full membership of the board, upon reconsideration of the measure, shall vote for it, the executive's veto shall be overridden and the ordinance shall become law without the executive's signature in accordance with the provisions of law.

L.1972,c.154, Sec.37, eff. Sept. 19, 1972. Amended by L.1975, c.84, Sec.12, eff. May 5, 1975; L.1975, c.257, Sec. 1, eff. Dec. 9, 1975.

C. FREEHOLDER BOARD

40:41A-38. Legislative power

The legislative power of the county shall be vested in the board of chosen freeholders.

L.1972, c.154, Sec.38, eff. Sept. 19, 1972.

40:41A-39. Chairman and vice-chairman; selection

At its organizational meeting each January the board shall select one of its members to serve as chairman and one as vice-chairman for the year.

L.1972, c.154, Sec.39, eff. Sept. 19, 1972.

40:41A-40. County executive at meetings

The county executive may be present and participate in discussions at all board meetings.

L.1972,c.154,Sec.40, eff. Sept. 19, 1972.

40A:9-77. Compensation of deputy county clerks; chief clerks and other personnel

The annual compensation of the deputy county clerk shall not exceed 3/4 of the annual compensation of the county clerk. The annual compensation of any chief clerk in the office of county clerk shall not exceed 3/5 of the annual compensation of the county clerk. The said compensations and that of all other personnel in the office of the county clerk shall be fixed by the board of chosen freeholders of the county upon the recommendation of the county clerk. The compensation of the personnel in the office of the county clerk shall be paid at the same time and in the same manner as county officers and employees are paid. The limitations of the salaries set herein shall not be construed to restrict any of the said employees from participating in or benefiting from any cost of living bonus or longevity program provided for or established in the county.

L.1971,c.200, Sec. 1, eff. July 1, 1971.

40:41A-41. Board powers

The Board of freeholders:

a. Shall advise and consent to all appointments by the executive for which board confirmation is specified under this article;

b. Shall pass in accordance with this act whatever ordinances and resolutions it deems necessary and proper for the good governance of the county;

c. ~~May~~ Shall appoint a clerk to the board who shall at its pleasure and keep the records and minutes of the board;

d. ~~May~~ Shall appoint the county counsel, to serve at the pleasure of the board. ~~The counsel shall~~ and head the county's legal department;

e. May pass a resolution of disapproval or dismissal, subject to the provisions of section 87b. of this act;[1]

f. May override a veto of the county executive by a two-thirds vote of its full membership;

g. Shall approve the annual operating and capital budgets. ~~The board may, by a majority vote reduce any item in the budget presented by the executive but may increase an item over the amount proposed by the executive only by a two-thirds vote~~ pursuant to the Local Budget Law.

L.1972, c.154, Sec.41, eff. Sept. 19, 1972.
Amended by L. 1975, c. 84, Sec. 13, eff. May 5, 1975.

D. CHIEF ADMINISTRATOR

40:41A-42. Appointment

The county executive shall appoint a ~~Chief~~ an administrator who shall serve at his pleasure. The board shall advise and consent to his nomination but shall not prevent his suspension or dismissal by passage of a resolution of disapproval.
L. 1972, c. 154, Sec. 42, eff. Sept. 19, 1972.
Amended by L. 1975, c. 84, Sec. 14, eff. May 5, 1975.

40:41A-43. Qualifications

The ~~chief~~ administrator shall by education, experience and ability be qualified to perform the duties established for him.

He need not be a resident of the county at the time of his appointment, but during his tenure he may live outside the county only with the permission of the county executive.
L.1972, c. 154, Sec. 43, eff. Sept. 19, 1972.
Amended by L. 1975, c. 84, Sec. 15, eff. May 5, 1975.

40:41A-44. Duties

The ~~chief~~ administrator shall be responsible only to the executive. He shall, under the direction and supervision of the executive, undertake to assist in the orderly and efficient administration

of the county, performing whatever supervisory or administrative duties the executive deems necessary and proper.

Nothing in this section shall be deemed to prohibit the ~~Chief~~ administrator's being appointed to head one or more departments on a temporary or permanent basis.
L.1972,c.154, Sec.44, eff. Sept. 19, 1972. Amended by L.1975, c. 84, Sec. 16, eff. May 5, 1975.

1:33-3. Assignment Judges

(a) Duties. The Assignment Judge shall, subject to the direction of the Chief Justice or rule of the Supreme Court, be responsible for the administration of civil and criminal justice and for the administration of all courts in the county for which he is the Assignment Judge. His duties shall include the following:

(1) The supervision of all trial judges sitting in the county and of all court clerks and other officers and employees of or serving the trial courts in the county.

(2) The supervision of the jury commissioners, the selection of all grand and petit jurors, and the organization and operation of the grand jury in the county.

(3) The supervision and expeditious movement of the civil and criminal trial calendars of the Superior and county courts and, through the judge or presiding judge thereof, of the juvenile and domestic relations court, the county district court and the municipal courts in the county.

(4) The implementation and enforcement in the county of all administrative rules, policies and directives of the Supreme Court, the Chief Justice, and the Administrative Director of the Courts.

(5) The representation of the judicial branch of government in the county in all matters pertaining to the budgets, personnel and facilities of the trial courts in the county.

(6) The performance of such other functions and duties as may be assigned him by the Chief Justice or by rule of the Supreme Court.

RULES OF GENERAL APPLICATION

(b) Power to Delegate. The Assignment Judge, subject to the approval of the Chief Justice, may delegate to any trial judge sitting in the county or to any officer or employee of the courts of the county such of the responsibilities, duties and functions imposed upon him by this rule as, in his discretion, he shall consider necessary or desirable. To assist him, he may designate, to serve at his pleasure, from among the court clerks and other em-

In the Matter of the COURT REORGANIZATION PLAN OF HUDSON COUNTY.

Supreme Court of New Jersey.

Argued Dec. 12, 1978.

Decided January 23, 1979.

On certification to the Superior Court, Appellate Division, whose opinion is reported at 161 N.J. Super. 483, 391 A.2d 1255(1978).

Harold Krieger, Hudson County Counsel, Jersey City, for appellants Edward F. Clark, Jr., Hudson County Executive, and Bd. of Chosen Freeholders of Hudson County (Harold Krieger, attorney; Francis X. Hayes, Asst. County Counsel, Jersey City, of counsel and on the brief).

Michael R. Cole, Asst. Atty. Gen., for respondent, the Honorable Thomas S. O'Brien, Assignment Judge of Hudson County (John J. Degnan, Atty. Gen., attorney).

Randy Kopf, Asst. County Counsel, Paterson, submitted a brief on behalf of amicus curiae County of Passaic (Martin Verp, Passaic County Counsel, Paterson, attorney).

PER CURIAM.

The judgment is affirmed substantially for the reasons expressed in the opinion of the Appellate Division, 161 N.J. Super. 483, 391 A.2d 1255. For affirmance: Chief Justice HUGHES and Justices MOUNTAIN, SULLIVAN, PASHMAN, CLIFFORD, SCHREIBER and HANDLER -7. For reversal: None.

SUPREME COURT OF NEW JERSEY
M-685 September Term 1978

IN THE MATTER OF THE COURT REORGANIZATION PLAN OF HUDSON COUNTY. : O R D E R

This matter having been duly presented to the Court, it is ORDERED that the motion of appellants for a stay of the Judgment of this Court pending an application to the United States Supreme Court for a stay is granted; and it is further

ORDERED that such stay shall remain in effect until Tuesday, February 13, 1979, provided that application for a stay is made to the United States Supreme Court no later than Friday, February 9, 1979; and it is further

ORDERED that a denial of the application to the United States Supreme Court prior to February 13, 1979 shall automatically terminate the remainder of the stay provided for by this order.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 29th day of January, 1979.

_____

Clerk

In Re The Matter of the Court Reorganization Plan of Hudson County.

Superior Court of New Jersey

Appellate Division

161 N.J. Super 483 391A2d 1255 (1978)

Argued July 18, 1978 - Decided August 4, 1978.

Before Judges Milmed, Larner and Ard.

Mr. Harold Krieger, Hudson County Counsel, argued the cause for appellants Edward F. Clark, Jr., Hudson County Executive, and Board of Chosen Freeholders of Hudson County (Mr. Frank T. Koserowski, Assistant County Counsel and Ms. Kathleen M. Grant, Assistant County Counsel, on the brief).

Mr. Michael Cole, Assistant Attorney General, argued the cause for respondent, the Honorable THomas S. O'Brien, Assignment Judge of Hudson County (Mr. John J. Degnan, Attorney General of New Jersey, attorney; Ms. Erminie L. Conley, Assistant Attorney General, of counsel; Mr. Stacy L. Moore, Jr., Deputy Attorney general, on the brief).

The opinion of the court was delivered by

Larner, J.A.D. This appeal arises out of a series of 16 orders issued by the Assignment Judge of Hudson County in his administrative capacity in implementation of the reorganization of the assignment procedures of civil and criminal causes in that county. We stayed the implementation of these orders pending disposition of the appeal and considered the merits of the same on an accelerated basis because of the importance of an early determination to the efficient functioning of the courts of Hudson County. The orders pertain to personnel designated as assistants to the assignment judge pursuant to the authority vested in him by R. 1:33-3(b) as the chief of the judicial system in the county. The orders deal with two categories of designated assistants, one in which the appointees have been acting in that capacity in the past, and the other in which employees in another capacity have been designated as assistants to the assignment judge with different duties and responsibilities. The orders not only designate the personnel to serve as assistants, but also establish their salaries for the current year, commencing July 1, 1978.

The record abundantly demonstrates that the assignment judge and his court administrator sought to achieve the reorganization plan encompas-

sing the assignments and salary designations through normal channels of submission to the county executive and board of chosen freeholders and their representatives on numerous occasions over a long period of time. It was only when such efforts proved fruitless and the county officials failed to approve or implement the reuqests of the assignment judge that he undertook the drastic remedy of issuing an order to show cause why the county officials should not be ordered to process and implement the changes in personnel and salaries.

This order to show cause merely served as the mechanism for granting the county executive and board of chosen freeholders an opportunity to be heard and voice their objections on the question of the proposed order. The order, however, was a purely administrative one issued by the judge in his administrative capacity rather than his judicial capacity. And although a hearing was not essential at that stage of the proceeding, the opportunity for the same reflects the sensible consideration of one public official for others where the proposed action may have an impact on the discharge of the responsibilities by such other public officials.

(1) The dichotomy between administrative and judicial action of the assignment judge becomes significant on this appeal only because of

appellants' contention that due process was not afforded to them in view of the failure of Judge O'Brien to disqualify himself at the hearing. This contention is manifestly without merit since it is based upon a mistaken view of the role of an assignment judge in this administrative function relating to court personnel. The hearing itself was not mandated by the due process requirements of proceedings involving adjudications between litigants. As already noted, appellants were granted a hearing as a gratuitous gesture and Judge O'Brien did not undertake to decide a justiciable controversy; nor did he sit in review of his own action. He simply used the public forum of a courtroom to hear the views of the county officials and to express his reasons for the issuance of the administrative order. This fully accords with fundamental fairness in this area of judicial administration, preserving the right of the aggrieved parties to seek review by appeal to this court.

Although appellants initially took the position that the assignment judge was compelled to accept as his assistants under R.1:33-3(b) those employees on the county clerk's payroll who may be assigned by the county clerk, at oral argument their counsel conceded the indisputable precept that the assignment judge has exclusive power to designate as

assistants those employees of the courts whom he feels would best serve the judicial system. The issue on this appeal has thus been narrowed to the question whether the assignment jduge has the power to fix the compensation to be paid by the county to those whom he appoints as his assistants under R.1:33-3(b), which provides:

> "To assist him, he (the assignment judge) may designate, to serve at his pleasure, from among the court clerks and other employees of the courts in the county such assignment clerks and other assistants as he may deem necessary or desirable."

And if he has that power, where does the burden lie as to proof of reasonableness and necessity for the salaries fixed by him?

(2,3) Prior to our consideration of the legal aspects of this issue, we pause to observe that the record before us amply supports the need for the reorganization plan proposed by the assignment judge. It is not in our province to determine whether any plan, experimental or otherwise, should or should not be instituted in any county relating to the control of calendaring and assignment of criminal and civil causes, or whether a plan selected by an assignment judge is the best or most efficacious means of imporving the administration of justice. The assignment judge, as the chief administrator of the

county judicial system, under the overall aegis of the Supreme Court, has extensive powers and discretion to undertake new techniques and methods which he may deem appropriate to carry out his functions and responsibilities subject, of course, to the direction, if any, of the Supreme Court. In doing so he is not required to seek the prior imprimatur of the Supreme Court, as suggested by appellants, since that court has already delegated that power by the cited rule which it has adopted. And, what is more certain, he need not obtain the stamp of approval of the members of the county government in doing that which he deems appropriate to carry out his functions of administration.

(4) The judicial power is vested in the courts of this State by the Judicial Article of the New Jersey Constitution (Art. VI, Sec. 1, par.1) and the Supreme Court is empowered to make rules governing the administration of all courts (Art. VI, Sec.2, Par 3). Accordingly, the Supreme Court, through R. 1:33-3(a) and (b), has delegated to the assignment judges of the State the broad powers of administration encompassed therein. Whether it be the Supreme Court directly or the assignment judge as its alter ego in the county, this power and authority encompasses all facets of the internal management of our courts. See Passaic Cty. Probation Officers' Ass'n v. Passaic

Cty., 73 N.J. 247, 251-255 (1977). In re Brennan, 126 N.J. Super. 368, 374-375 (App. Div. 1974); Lichter v. Monmouth Cty., 114 N.J. Super. 343, 348-349 (App. Div. 1971).

(5) Under the basic principle of separation of powers underlying our State and Federal Governments, this judicial power must be untrammeled and independent of interference by the other branches of government, executive or legislative. Despite this doctrine of separation of powers, however, the functioning of government defies practical implementation by the creation of water-tight compartments for each branch of government. See In re Salaries for Probation Officers of Bergen Cty., 58 N.J. 422, 425-426 (1971). As one judge succinctly expressed it:

> It is the imperfection of human institutions which gives rise to our notion of inherent power. It is simply impossible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws. The proper exercise of each of these three great powers of government necessarily includes some ancillary inherent capacity to do things which are normally done by the other departments. (Judges for Third Judicial Cir. v. County of Wayne, 383 Mich. 10, 172 N.W. 2d 436, 440 (Sup. Ct. 1969).

(6) It follows that a court, and in this case the assignment judge in his administrative capacity, has the inherent power to provide the facilities,

personnel and resources reasonably necessary for the performance of the judicial functions in the county. And as a corollary thereof he must have the power to compel the appropriation and expenditure of funds by the coequal executive and legislative branches of government to accomplish such purpose, subject only to bounds of reasonable discretion. See Hazard, McNamara and Sentilles, "Court Finance and Unitary Budgeting," 81 Yal L.J. 1286, 1287-1291 (1972); Vanderbilt, The Doctrine of Separation of Powers and Its Present-day Significance (1953); Annotation, "Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes." 59 A.L.R. 3d 569)1974).

(7) We should emphasize at this point that this inherent power should be exercised very sparingly, in deference to the prerogatives of the legislative and executive branches. It should be invoked by the judicial branch only where necessary personnel and facilities are not provided by the other branches of government through the traditional and conventional methods. "The separtion-of-powers doctrine contemplates that the several branches will cooperate to the end that government will succeed in its mission." In re Zicarelli, 55 N.J. 249, 264 1970).

Normally, such methods entail requests by the

assignment judge to the board of freeholders and county executive in the form of the proposed judicial budget or particular applications with factual explanations setting forth the figures and needs, together with conferences and presentations which usually result in a satisfactory resolution of the problems involved. However, as in this instance, when these normal channels and methods of cooperative efforts fail and the holders of the purse force a confrontation, the judge has the power to do whatever may be essential to the carrying out of his inherent and constitutional functions.

(8) In applying these principles to the narrow appellate issue herein we conclude that with respect to the fixing of salaries for all the employees designated as assistants to the assignment judge, the latter has the inherent power to establish the compensation for such assistants provided that the quantum thereof is reasonable and appropriate. For cases sustaining the inherent power of the judiciary not only to appoint necessary personnel but to fix their compensation see: Zylstra v. Piva, 85 Wash. 2d 743, 747-748, 539 P. 2d 823, 826-827 (Sup. Ct. 1975); State ex rel. Weinstein v. St. Louis Cty., 451 S.W. 2d 99 (Mo. Sup. Ct. 1970), Judges for Third Judic. Cir. v. Wayne Cty., 386 Mich. 1, 190 N.W. 2d 228 (Sup. Ct. 1971); Leahey v. Farrell, 362 Pa 52, 66 A. 2d 577

(Sup. Ct. 1949); Commonwealth ex rel. Carroll v. Tate, 442 Pa. 45, 274 A. 2d 193 (Sup. Ct. 1971); McAfee v. State ex rel Stodola, 258 Ind. 677, 284 N.E. 2d 778 (Sup. Ct. 1972); Noble Cty. Council v. State, 234 Ind. 172, 125 N.E. 2d 709 (Sup. Ct. 1955); Smith v. Miller, 153 Colo. 35, 384 P. 2d 738 (Sup. Ct. 1963); cases collected in Annotation, supra, 59 A.L.R. 3d 569; American Bar Association, The Improvement of the Administration of Justice 27 (1971).

(9) In testing whether the designated salaries are reasonable under all the circumstances, there should be taken into consideration the responsibilities and effort involved in the assigned posts, the experience of the individuals, the skill and talent required for each position and all the other usual elements which enter the thought processes of an employer bent upon attracting intelligent and competent personnel to handle the assigned tasks.

(10) The power of the assignment judge to select and assign as his assistants those who satisfy his needs from the coterie of county employees stems from the inherent power of the courts as implemented by R. 1:33-3(b). And although these assistants may remain county employees for the purpose of their remuneration, they nevertheless serve under the control and direction of the assignment judge in the unclassified category and at his pleasure. Similarly, although the financial

burdens related to their positions are imposed on the county, nevertheless the assignment judge has the inherent power when necessary to fix their salaries. Such a hybrid status is not unusual under our county government structures. For analogous situations see Dunne v. Fireman's Fund Am. Ins. Co., 69 N.J. 244, 248-249 (1976); In re Bigley, 55 N.J. 53 (1969); Rolleri v. Lordi, 146 N.J. Super. 297 (App. Div. 1977); In re Brennan, supra, 126 N.J. Super. 368; In re Application of Schragger, 58 N.J. 274 (1971).

Appellants also urge that the assignment judge does not have the power to fix the compensation for his assistants because of legislative enactments dealing with the appointment and fixing of salaries of personnel attached to the county clerk's office. They point to N.J.S.A. 40A:9-74, which assigns to the county clerk, a constitutional officer elected by the people, the duty to "select and employ necessary clerks and other employees," and to N.J.S.A. 40A:9-77, which provided that the compensation of all such personnel in the office of the county clerk shall be fixed by the board of chosen freehodlers. It is argued that since, under R. 1:33-3(b), the assistants designated by the assignment judge are culled from the court personnel who are on the county clerk's payroll, that only the board of chosen freeholders has the power to fix their compensation and that the order of the

assignment judge relating to compensation is therefore ultra vires and void.

As we have already noted, the inherent power of the judiciary stemming from its exclusive control of the courts and their administration is paramount to the right of the legislative or executive branches to interfere therewith. And since this inherent power is derived from constitutional imperatives it must transcend any legislative directives in conflict therewith.

We recognize the wisdom of caution and hesitancy by the judiciary in asserting such power when it conflicts with legislative enactments relating to employees who serve the judicial system. This doctrine of comity and respect for the other branches of government is firmly established as a policy determination by the Supreme Court in Passaic Cty. Probation Officers' Ass'n. v. Passaic Cty., supra:

> The conclusion is quite inescapable that the constitutional mandate given this Court to "make rules governing the administration of all courts in the State" transcends the power of the Legislature to enact statutes governing those public employees properly considered an integral part of the court system. It has, however, since 1948, been the practice of this Court, with only occasional deviation, to accept and adopt legislative arrangements that have not in any way interfered with this Court's constitutional obligation discussed above. We have every intention of continuing this practice; to do otherwise would be pointless and self-defeating. Only where we are satisfied that the proper exercise

> of our constitutional responsibility to superintend the administration of the judicial system requires such action would we feel compelled to exert this power in the adoption of a rule at odds with a legislative enactment. We repeat that in the absence of any action by this Court - felt to be constitutionally compelled - and as a matter of comity and respect for other branches of government, we accept and adopt all statutory arrangements touching or concerning the administration of any courts in the State, as well as such legislative enactments as have to do with public employees whose duties are intimately related to the judicial system. (73 N.J. at 255).

In harmony with this admonition, we particulary limit our determination to the facts herein, involving the ambit of power of an assignment judge with respect to those employees designated by him as his assistants under R. 1:33-3(b). We are not called upon at this time and therefore express no opinion on the outer bounds of that power as it may apply to other county employees whose duties are intimately related to the judicial system.

(11) In recognition of this limited scope of the litigation before us, we have no hesitancy in concluding that the constitutionally derived inherent power of the assignment judge to select his own assistants and to fix their salaries transcends the statutory power of the board of chosen freeholders to fix salaries of employees in the office of the county clerk. This conclusion is constitutionally compelled and must obtain as paramount to the general statutory pattern

relating to county employees.

(12) Having reached this conclusion, we turn to the issue whether the exercise of power in the fixing of salaries of the 16 assistants involved herein was arbitrary and capricious, for, as with all state administrative decisions, the action of the assignment judge is subject to appellate correction if it is exercised in such a manner as to exceed the bounds of reasonable discretion. As we have commented earlier in this opinion, the record fully supports the need for these assistants within the framework of the re-organization plan conceived by the assignment judge.

We also find that the salaries allocated to the positions and the particular individuals designated to fill those positions fall within the requisite standard of reasonableness. This finding applies both as to those designated for new positions with greater responsibilities and work requirements and as to those who were awarded salary increments in their present positions. Without reference to the factual complex of each position and each assistant it is manifest that the assignment judge, after a careful analysis of the relevant factors, arrived at salary figures appropriate for attracting competent and loyal workers to carry out the important administrative functions assigned to them. In fact, there is some indication that the salaries are considerably below

those earned by counterparts in other first-class counties of this State. And simply because these salaries may exceed those negotiated for other county employees or may be utilized by their labor representatives in pending contract negotiations is of no relevancy as to the appropriateness of the orders relating to the small group of special assistants herein who are not represented by the employee unions.

Appellants advance the position that the action below should be reversed because the assignment judge has failed to bear the burden of establishing that the salaries proposed by the board of chosen freeholders are so outrageously low that competent assistants cannot be found amoung court personnel who will perform the necessary services within the salary range set by the board. They contend that in the absence of such factual proof there is no basis for a finding that the county legislative body has so frustrated the administration of justice as to warrant affirmative action by the assignment judge.

(13) We agree that in view of the statutory pattern relating to salaries of court employees, the burden is on the assignment judge to establish that the appointment of the assistants and the salaries fixed by him are reasonably necessary for the efficient administration of justice. And we hold that this burden has been sustained.

We do not, however, agree with appellants' contention as applied to the facts of this case, that the court must bear the burden of proof that the salaries proposed by the board of chosen freeholders are so inadequate that no county employees can be found to fill the positions and that as a consequence the courts cannot function. Cf. Matter of Salary of Juvenile Director, 87 Wash. 2d 232, P. 2d 163, 175 (Sup. Ct. 1976); Commonwealth ex rel. Carroll v. Tate, supra, 442 Pa. at 55, 274 A. 2d at 199. To impose such a burden on the assignment judge in this sensitive and subjective area of personnel evaluation and fair compensation would be an inappropriate and insurmountable obstacle. There is no doubt that some persons with lesser qualifications can always be found to accept a particular job at any salary, inadequate or not. To require a showing that such candidates are not available from the corps s of county employees as a precondition to a finding of reasonableness of the action below would truly interfere with the judicial prerogative to select competent assistants at a fair and reasonable salary.

(14) Where the question of burden of proof arises in the limited context of designation and compensation of special assistants authorized by court rule, and the record supports a prima facie showing of reasonableness and necessity for the administrative action,

it behooves the objecting officials to undertake the burden of proving that the court's action is arbitrary and unreasonable. See McAfee v. State ex rel. Stodola, supra; 258 Ind. at 681, 284 N.E. 2d at 782.

Neither the record below nor that on appeal presents a semblance of proof by appellants that the judge's orders are arbitrary and beyond the bounds of reasonable necessity. Appellants' bald assertion that they disagree with the salary schedule or that they feel that lesser salaries would be more appropriate from their viewpoint as elected officials does not serve to establish the arbitrariness which is a prerequisite to appellate interference with the assignment judge's administrative discretion. In the absence of abuse of that discretion, this court will not disturb the orders by which the assignment judge exercised his authority.

The decision below is therefore affirmed, and the stay heretofore granted is dissolved. [1]

1. Appellants also moved to expunge from the record certain confidential material sealed by the assignment judge which was obliquely referred to in his fingings. This material was not submitted to this court and was not seen or considered by us in the determination of this appeal. As a consequence, the motion to expunge is denied.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-4302-77

CIVIL ACTION

ON APPEAL FROM

IN RE MATTER OF THE COURT REORGANIZATION PLAN OF HUDSON COUNTY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

SAT BELOW

Hon. Thomas S. O'Brien, A.J.S.C.

BRIEF AND APPENDIX
FOR
DEFENDANTS-APPELLANTS

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POINT II

SEPARATION OF POWERS CLAUSE OF THE NEW JERSEY CONSTITUTION HAS BEEN VIOLATED WHEN THE JUDICIARY INFRINGES UPON THE FISCAL POWERS OF THE LEGISLATURE.

It is a basic concept of our constitutional form of Republican Government that the legislature is an independent and co-equal Board of Government, along with the Judicial and Executive Branches. The doctrine of separation of powers is not confined to the federal constitution. As noted by Justice William O. Douglas in The Anatomy of Liberty, The Rights of Man Without Force (1963), at page 54:

> "Six of the original states explicitly affirmed the doctrine of the separation of powers. Today the theory is formally announced in about forty state constitutions. The other states make no such formal declaration; nor does the Constitution of the United States. Yet the same result is reached because these other states' constitutions, as the federal constitution, create three departments of government, vesting the executive power in one, the legislative power in another, and the judicial power in a third."

New Jersey is among those states which divide the powers of government into three distinct departments. Article III. Sec. 1, Constitution of New Jersey 1947:

> "1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either or the others, except as expressly provided in this Constitution."

POINT IV

FAILURE OF THE ASSIGNMENT JUDGE TO DISQUALIFY HIMSELF DENIED A FAIR HEARING AND VIOLATED N.J.S.A. CONSTITUTION ARTICLE I, PARAGRAPH I

N.J.S.A. Constitution Article I, Paragraph I provides:

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

This provision has been interpreted to confirm a right of procedural due process and the right to procedural due process requires any hearing, judicial or quasi-judicial, to possess the elements of fundamental fairness. David v. Strelecki, 97 N.J. Super. 360 (App. Div. 1967) reversed on other grounds.

Furthermore, N.J. Court Rule 1:12-1 provides:

> "Cause for Disqualification; On the Courts Motion. The judge of any court shall disqualify himself on his own motion and shall not sit in any manner, if he
>
> * * * *
>
> (e) is interested in the action; or (f) when there is any reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so."

In the case at bar, it appears that the assignment Judge should not have presided over the hearing.

SUPREME COURT OF NEW JERSEY

DOCKET NO.

IN THE MATTER OF THE COURT)
REORGANIZATION PLAN OF)
HUDSON COUNTY) SAT BELOW

Judge S. Larner
Judge L. Milmed
Judge J. Ard

PETITION FOR CERTIFICATION

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STATEMENT OF QUESTIONS INVOLVED

1. Were the show cause orders issued in this case judicial orders or administrative orders?

2. Under what circumstances can the doctrine of inherent judicial authority be exercised?

3. Were the Petitioners denied a fair hearing and procedural due process? Should the Assignment Judge have disqualified himself from conducting the hearing? Was he in conflict of interest?

4. Did the action of the Assignment Judge constitute an improper check on the legislative branch by the judicial branch?

5. Does the constitutional plenary administrative power of the courts override the constitutional plenary legislative power of taxation and regulation of the fiscal affairs of the state? If so, under what circumstances?

Note These are the same constitutional questions that would be raised on an appeal as of right.